83-830

In The

Supreme Court of the United States

NO.

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v

BOOTHE FINANCIAL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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ATTORNEYS FOR
PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER THE STATE OF OHIO'S CONSIDERATION OF THE ACQUISITION COST OF PROPERTY IN DETERMINING ITS VALUE FOR PURPOSES OF THE STATE'S *AD VALOREM* PROPERTY TAX IS WITHIN THE DISCRETION ALLOWED STATES UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATE'S CONSTITUTION. U.S. CONSTITUTION, AMENDMENT XIV, § 1.

PARTIES

The petitioner in this action is Joanne Limbach in her capacity as Tax Commissioner of Ohio. She is the successor to Edgar L. Lindley who in his capacity as Tax Commissioner of Ohio was a party to the proceedings below. The respondent is Boothe Financial Corporation.

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The Opinion of the Ohio Supreme Court is reported at *Boothe Financial Corp. v. Lindley*, 6 Ohio St. 3d 247, 452 N.E. 2d 1295 (1983). (A-2). The Decision and Order of the Board of Tax Appeals is unreported. (A-11)

JURISDICTION

The Opinion of the Ohio Supreme Court was entered as its judgment on August 17, 1983 (A-2) and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment, Section 1, of the United States Constitution, and Ohio Revised Code (R.C.) section 5711.18.

Fourteenth Amendment, Section 1, United States Constitution

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code § 5711.18

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such

net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, his findings and recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, the Tax Commissioner of Ohio, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this case.

STATEMENT OF THE CASE

This case originated as an appeal by Boothe Financial Corporation (hereinafter referred to as *Boothe*) from a personal property tax assessment on certain computer equipment which Boothe owned and leased to its customers. The assessment was based on the Tax Commissioner's rejection of Boothe's claim for a deduction from book value in computing its tax liability.

The equipment in question had been purchased from International Business Machine Corporation (IBM), which was the manufacturer. During the period in question IBM also leased equipment to customers in Ohio.

Boothe's objection to the assessment was based on its claim that the Tax Commissioner's use of acquisition costs in valuing the computer equipment for taxation resulted in a lower valuation for the property of manufacturer/lessors, such as IBM, than for lessors, such as Boothe, which purchased their equipment from the manufacturer.

On appeal to the Ohio Board of Tax Appeals, that body affirmed the assessment as correct under the statute. The Ohio Supreme Court, however, reversed. It determined that, although Boothe's valuation was correct under the law, the use of acquisition cost as the basis for valuation violated the Equal Protection Clause by causing similar property to be valued lower for purposes of taxation. The Court rejected the circumstances of acquisition as a rational basis for such differences in valuation.

This Petition has followed.

ARGUMENT IN SUPPORT OF ALLOWING WRIT OF CERTIORARI

The Decision of the Ohio Supreme Court Below Conflicts With This Court's Interpretation and Application of the Fourteenth Amendment of the United States Constitution.

In this case the Supreme Court of Ohio has held that the State of Ohio is required to assess comparable property at the same value, irrespective of the cost which the taxpayers were willing to pay in order to acquire such property. Relying on this Court's decision in *Southern Railway Co. v. Watts*, 260 U.S. 519, 67 L.Ed. 375, 43 S.Ct. 192 (1923), the Ohio court held that the use of acquisition cost creates an unreasonable classification and, therefore, denies certain taxpayers equal protection under the law. The Tax Commissioner submits that this is an erroneous interpretation of the constitutional requirement of equal protection under the law.

The guarantee of equal protection is set forth in the Fourteenth Amendment, Section 1, United States Constitution, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. In giving effect to this provision this Court has considered first whether the statute in question does, by its terms or application, establish separate classifications which treat taxpayers differently, and, if so, whether such classifications are so arbitrary as to be beyond the State's authority. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 3 L.Ed. 2d 48, 79 S.Ct. 437 (1958).

In the instant case the statute in question is R.C. 5711.18, which provides for the listing and valuation of personal property for purposes of taxation. By its terms the statute makes no classification of personal property for purposes of valuation. That section sets up one rule for all "personal property used in business," namely that it be valued at depreciated book value, unless true value is determined to be something else.

Likewise the application of the statute has been uniform with respect to all taxpayers. Specifically, the Tax Commissioner has looked to each taxpayer's actual cost in determining the value of the property to the taxpayer. In the case of Boothe this cost was what it was willing

to and did pay for the equipment. In the case of IBM, which produced the equipment, the actual cost was its manufacturing cost, since that was the amount that IBM was willing to and did spend for the equipment. It follows that while each taxpayer's own fact and experience may have been different, the statutory standard or rule applied was the same, namely, actual acquisition cost less depreciation.[1] There was, therefore, no different classification of Boothe and IBM under R.C. 5711.18, merely the application of the same rule to two different sets of facts. Nothing in such circumstances constitutes a violation of equal protection.

Moreover, even to the extent that consideration of a taxpayer's actual acquisition cost is viewed as "classifying" that taxpayer, such "classification" is not prohibited by the Equal Protection Clause of the Fourteenth Amendment. In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868 (1937), the U.S. Supreme Court stated at pp. 509, 510:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. *Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation.* See *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237, 10 S.Ct. 533, 33 L.Ed. 1102, 87 A.L.R. 374. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * *.
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree hav-*

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[1]In its majority opinion the Ohio Supreme Court noted that the taxpayer had not challenged the correctness of its valuation under the statute.

ing a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. ° ° °." [Emphasis added].

Similarly, in *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 795, 50 S.Ct. 310 (1929), this Court noted that states may classify the subjects of taxation, provided the classification rests upon a ground or difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced are treated alike. In its opinion the Court cited at p. 163 another case in which it had just held that a tax on cigar dealers which was based on the selling price of the product was not repugnant to the Fourteenth Amendment merely because of an alleged difference in the wholesale price paid by dealers who bought from manufacturers and the price paid by those who did not. *Exchange Drug Company v. Long,* 281 U.S. 693, 74 L.Ed. 1122, 50 S.Ct. 244 (1930).

More recently in *Lehnhausen v. Lake Shore Auto Parts Co. et al.,* 410 U.S. 356, 35 L.Ed. 2d 351, 93 S.Ct. 100 (1973), and *San Antonio Independent School District et al. v. Rodriguez,* 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973), the Court upheld other state provisions against objections advanced under the Equal Protection Clause. In *Lehnhausen, supra,* the Court upheld an Illinois provision which authorized *ad valorem* taxes on personal property of corporations, but not on personal property of individuals. Noting the broad discretion given to states in the manner of taxation and Illinois' valid concern with maintaining an economically and administratively sound system of taxation the Court declined to substitute its judgment for that of the state legislature.

In *San Antonio Independent School District et al., supra,* the Court considered an attack on Texas' school-financing system which relied on local property taxation.

The Court rejected the argument that the system denied equal protection to persons living in districts with a low tax base. In doing so it noted at p. 41 that "[n]o scheme of taxation . . . has yet been devised which is free of all discriminatory impact." It, therefore, deferred to the state's "broad discretion" in approaching the fiscal question of financing education.

With respect to the Ohio Court's reliance on *Southern Railway Co. v. Watts, supra,* it misconstrues the effect of that case. While this Court did hold that differences in valuation of property in the same class may violate equal protection, it stated that the different valuation must be intentional and systematic. It also stated that differences in classes of property, and in the "conditions of ownership" may make difference in treatment unavoidable. As in the later cases discussed above, this Court recognized that differences in valuation do not *ipso facto* result in a violation of equal protection.

All of the above cases recognize that the States do have broad discretion in designing and administering tax laws, and such laws violate the Equal Protection Clause only when they establish classifications, which have no rational basis and which constitute an intentional and systematic discrimination against a class. In the instant case, Tax Commissioner's use of acquisition cost as the basis for computing the value of property subject to tax is neither unreasonable nor arbitrary. On the contrary it reflects the true value of the property to the taxpayer, and is a legitimate attempt by the State to implement an economically and administratively sound system of taxation within the scope of discretion permitted by this Court's decisions. The decision of the Ohio Supreme Court disregards these principles and is, therefore, erroneous in its interpretation and application of the Fourteenth Amendment.

CONCLUSION

The Ohio Supreme Court found a violation of the Equal Protection Clause because "essentially identical equipment" is valued differently for tax purposes as a result of differences in the amounts that different taxpayers pay for the property. This holding is directly contrary to the United States Supreme Court's interpretation of the Fourteenth Amendment, as well as this Court's long recognition that the states enjoy broad discretion in adopting tax laws which are not unreasonable or arbitrary in their effect. For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to George M. Hauswirth, Jean Y. Teteris, Porter, Wright, Morris & Arthur, 37 West Broad Street, Columbus, Ohio 43215, counsel for respondent, by United States mail, postpaid, this day of November, 1983. I further certify that all parties required to be served have been served.

JAMES C. SAUER
Assistant Attorney General

APPENDIX

No. 82-1305

THE SUPREME COURT OF OHIO

BOOTHE FINANCIAL CORPORATION,

Appellant, v.

LINDLEY, TAX COMMR.,

Appellee.

OPINION

Decided and Filed August 17, 1983

BOOTHE FINANCIAL CORPORATION, APPELLANT, *v.* LINDLEY, TAX COMMR., APPELLEE.

[Cite as Boothe Financial Corp. *v.* Lindley (1983), 6 Ohio St. 3d 247.]

Taxation—Personal property tax—Unlawful discrimination against taxpayer by undervaluation of competitor's property—Equal Protection Clause violated when.

O.Jur 2d Taxation §§ 65, 70, 354.

1. A taxpayer, although assessed at not more than true value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. (*Southern Railway Co.* v. *Watts*, 260 U.S. 519, followed.)

2. A taxpayer who leases equipment is denied equal protection when a competitor, who manufactures and leases essentially identical equipment, is allowed to grossly undervalue his property by reporting the value of his equipment at manufacturing cost less depreciation, and the former is not allowed to report the value of equipment in the same manner.

(No. 82-1305—Decided August 17, 1983.)

APPEAL from the Board of Tax Appeals.

This is an appeal from a decision by the Board of Tax Appeals ("BTA"). In its decision, the BTA imposed assessments on appellant, Boothe Financial Corporation.[1] These assessments arose out of appellant's operations in tax years 1970 and 1971.

During those years, appellant owned computer equipment which it leased to customers in Ohio. The equipment appellant leased was manufactured by International Business Machines ("IBM"), and appellant acquired this equipment either by direct purchase from IBM or indirectly through third-party transactions.[2] During this period, IBM also leased the same type of computer equipment to customers in Ohio.

On their Ohio personal property tax returns, both IBM and appellant were required to report the leased equipment under Schedule Four as property not used in manufacturing. Each was required to report the "true value" of the equipment. The leased computers were taxed at seventy percent of true value.

IBM based true value on manufacturing cost less depreciation. In its tax returns for 1970 and 1971, appellant filed a claim to reduce the value of its equipment to a level uniform with IBM. Like IBM, appellant sought to reach true value by manufacturing cost less depreciation.

Upon an audit of appellant's return, the appellee's agent increased the true value of the equipment to acquisi-

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[1]Boothe Financial Corporation was formerly known as Boothe Computer Corporation.

[2]Appellant would effect indirect purchases from IBM by giving the purchase price of a computer to one of IBM's lessees. Then the lessee would use the money to purchase the equipment from IBM by exercising an option in its lease agreement with IBM. Appellant would take title to the computer and lease it to the former IBM lessee.

tion cost less depreciation. Consequently, appellant's equipment was assigned a true value approximately six times that of IBM's for the same type of equipment.[3]

Appellant filed applications for redetermination with the appellee. In part, appellant argued that the disparity of true value between it and IBM constituted a denial of equal protection. The appellee rejected this argument, finding that it did not have jurisdiction to address this constitutional issue.

Appellant appealed to the Board of Tax Appeals. The board affirmed, without addressing appellant's constitutional claim.

The cause is now before this court upon an appeal as of right.

Messrs. Porter, Wright, Morris & Arthur, Mr. Roger F. Day, Mr. George M. Hauswirth and *Ms. Jean Y. Teteris,* for appellant.

Mr. Anthony J. Celebrezze, Jr., attorney general, and *Mr. James C. Sauer,* for appellee.

HOLMES, J. R.C. 5711.22 required appellant and IBM to list their personal property at seventy percent[4] of true value in money. The method for determining true value is set forth in R.C. 5711.18, which provides, in pertinent part:

"* * * In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the

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[3]In some instances the same computers were involved. Appellant would indirectly purchase computers that IBM had been using. The following year, appellant was required to base the value of the machine on acquisition cost so that the value would increase about six-fold.

[4]The General Assembly has since reduced this percentage.

assessor finds that such depreciated book value is greater or less than the then true value of such property in money. * * *"

In *State, ex rel. Park Investment Co.*, v. *Bd. of Tax Appeals* (1964), 175 Ohio St. 410 [25 O.O.2d 432], we discussed the meaning of the term "true value," stating at 412:

"In the last analysis the value or true value in money of any property is the amount for which that property would sell on the open market by a willing seller to a willing buyer. In essence, the value of property is the amount of money for which it may be exchanged, *i.e.*, the sales price."

Since then this court has variously stated that standard, but we have consistently held that ultimately true value is to reflect market value. See, *e.g.*, *Grabler Mfg. Co.* v. *Kosydar* (1975), 43 Ohio St. 2d 75 [72 O.O.2d 42]; *Conalco* v. *Bd. of Revision* (1977), 50 Ohio St. 2d 129 [4 O.O.3d 309]; *Meyer* v. *Bd. of Revision* (1979), 58 Ohio St. 2d 328 [12 O.O.3d 305]; and *Tele-Media Co.* v. *Lindley* (1982), 70 Ohio St. 2d 284 [24 O.O.3d 367].

Here, the appellee required appellant and IBM to determine the value of their property by using depreciated book value. IBM based its book value on manufacturing cost, while appellant was required to base its book value on acquisition cost. This resulted in appellant's property being valued at between six and seven times that of IBM's,[5] even though, for practical purposes, appellant's property is identical to IBM's.

Appellant does not challenge the lawfulness of the valuation of his property. Rather, appellant argues that allowing IBM to determine the value of its property by

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[5]*I.e.*, the value of appellant's computers when based on depreciated acquisition cost rather than depreciated manufacturing cost.

using manufacturing cost less depreciation, with its concomitant gross undervaluation, without allowing it the same privilege, denies it equal protection.[6] Under the facts of this particular case, we conclude that appellant was denied equal protection of the laws, so we reverse.

States have great discretion in laying taxes; however, the taxing power is subject to the Equal Protection Clause. *Allied Stores of Ohio, Inc.* v. *Bowers* (1959), 358 U.S. 522, 526. In *Hillsborough* v. *Cromwell* (1946), 326 U.S. 620, the court discussed the application of the Equal Protection Clause to tax cases and said, at page 623:

"The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. * * *"

Also, in *Southern Railway Co.* v. *Watts* (1923), 260 U.S. 519, 526, the court spoke on the same subject:

"* * * The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. *Raymond* v. *Chicago Union Traction Co.* [1907], 207 U.S. 20."[7]

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[6]Equal protection is guaranteed by the Fourteenth Amendment to the United States Constitution, and Section 2, Article I of the Ohio Constitution.

It should be noted that appellant does not argue that R.C. 5711.18 is facially unconstitutional; rather, appellant contends that its present application deprives it of equal protection.

[7]Likewise, in *Southland Mall, Inc.* v *Garner* (C.A. 6, 1972), 455 F. 2d 887, the court said at page 889:

"In order to establish an equal protection violation it is not necessary for a taxpayer to prove that he was overassessed. He may show that his property was assessed at its true value while other property was intentionally undervalued."

By applying these standards to the present dispute, its resolution becomes obvious. Both IBM and appellant were required to report the value of their property so that the value approximated market value. However, the appellee allowed IBM, a manufacturer-lessor, to report its property in a manner, manufacturing cost less depreciation, which caused it to be grossly undervalued. Furthermore, only a manufacturer, IBM, was allowed to so undervalue its property. Thus, the appellee intentionally and systematically treats members of the same class, lessors of equipment, differently because one is a manufacturer. This denied appellant the "right to equal treatment." *Hillsborough* v. *Cromwell, supra.* Further, appellant was discriminated against by the undervaluation of IBM's property. *Southern Railway Co.* v. *Watts, supra.* See, also, *Koblenz* v. *Bd. of Revision* (1966), 5 Ohio St. 2d 214 [34 O.O.2d 424].

Nonetheless, appellee argues that the disparate treatment of IBM and appellant does not violate equal protection. First, appellee correctly states that the different treatment of similarly situated taxpayers does not violate equal protection as long as there is rational basis for that treatment. *Lehnhausen* v. *Lake Shore Auto Parts Co.* (1973), 410 U.S. 356; *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* at 527. Further, appellee argues that there is a rational basis for that treatment because appellant and IBM incurred different costs in securing their respective computers.

This does not justify the disparate treatment here, for, as discussed above, the ultimate end of a tax on true value is a tax on market value. *State, ex rel. Park Investment Co.,* v. *Bd. of Tax Appeals; Grabler Mfg. Co.* v. *Kosydar; Conalco* v. *Bd. of Revision; Meyer* v. *Bd. of Revision;* and *Tele-Media Co.* v. *Lindley, supra.* Consequently, cost figures cannot serve as justification for treating a purchaser-

lessor differently from a manufacturer-lessor as each should be taxed on market value.[8]

Based on the foregoing, we hold that a taxpayer who leases equipment is denied equal protection when a competitor, who manufactures and leases essentially identical equipment, is allowed to grossly undervalue its property by reporting the property's value as manufacturing cost less depreciation, and the former is not allowed to value his property in the same manner.

Accordingly, we reverse the decision of the Board of Tax Appeals, and remand this cause in order that appellant may be allowed to report the value of its property in the same manner as IBM.

Judgment accordingly.

W. BROWN, SWEENEY and C. BROWN, JJ., concur.

CELEBREZZE, C.J., LOCHER and J. P. CELEBREZZE, JJ., dissent.

CELEBREZZE, C.J., dissenting. Although the majority's holding may appear to reach a fair result, I dissent because

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[8]Alternatively, appellee argues that its method of establishing value must be upheld because to use a method other than depreciated book value will cause an administrative nightmare.

We disagree. First, it is questionable whether administrative convenience can justify a denial of equal protection. See, *e.g.*, *Reed* v. *Reed* (1971), 404 U.S. 71. Second, this decision will not result in all similar equipment being given the same value. Rather, the value of all similar equipment must be determined in the same manner. When the value of a manufacturer-lessor's equipment becomes so undervalued that it does not reflect market value, the appellee must either adjust the manner in which the manufacturer establishes value, or risk equal protection challenges from competing purchaser-lessors. We note that other states require manufacturer-lessors to report equipment at its market value instead of manufacturing cost which does not reflect objective market value. See, *e.g.*, *Dept. of Assessments and Taxation* v. *Greyhound Computer Corp.* (1974), 271 Md. 575, 320 A. 2d 40; *State, ex rel. IBM Corp.*, v. *Bd. of Review* (1939), 231 Wis. 303, 285 N.W. 784; *Xerox Corp.* v. *Hennipen* (1976), 309 Minn. 239, 244 N.W. 2d 135; *Xerox Corp.* v. *Bd. of Review* (Iowa 1980), 298 N.W. 2d 416.

I feel that the valuation of appellant's property is constitutional.

While the statement in paragraph one of the syllabus may be correct, it also is incomplete. The quoted statement from *Southern Railway Co.* v. *Watts* (1923), 260 U.S. 519, 526, continues: "But, *unless* it is shown that the *undervaluation was intentional and systematic,* unequal assessment *will not* be held to *violate the equality clause.*" (Emphasis added.) This is a critical omission.

Thus, appellant has the burden of showing that the disparity in valuation was intentional and systematic. However, the record fails to establish a systematic or deliberate attempt by appellee to discriminate.

Instead, the taxpayers were treated uniformly. The Tax Commissioner used both of the taxpayers' costs of acquisition in determining the value of the property. In appellant's case, the cost is the amount it paid for the equipment. In IBM's case, the cost used with the manufacturing cost or the amount IBM spent for the equipment. Thus, the same standard, acquisition cost less depreciation, was applied in both cases. When any item is purchased, the price may vary depending upon the circumstances of the sale. Thus, the assessments, based upon the acquisition costs, may vary for the same item.

Although the application of the acquisition cost resulted in disparate assessments, this alone is insufficient to show that the lesser valuation of IBM's equipment was intentional or systematic. Furthermore, appellant has presented a comparison with only one other taxpayer and for the tax years 1970 and 1971. This is not sufficient evidence to show either a systematic or deliberate attempt to discriminate.

This conclusion is supported by the rule that states have great discretion in levying taxes. According to the United States Supreme Court:

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation." *Carmichael* v. *Southern Coal & Coke Co.* (1937), 301 U.S. 495, 509.

Thus, we are not bound by a rigid rule of equality of taxation. Our discussion, in *Myer* v. *Bd. of Revision* (1979), 58 Ohio St. 2d 328 [12 O.O.3d 305], concerning inequality of taxation, is appropriate in this case. According to Justice Holmes' opinion:

"The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle." *Id.* at 335.

According to this rationale, practicality should be considered when perfect equality in taxation is not reasonably attainable. In this case, appellee used the same standard, acquisition cost, for assessing both IBM and appellant. This is a consistent method of assessment and appears to be a practical approach.

Therefore, I conclude that appellant has not established that the valuations in this case constitute intentional or systematic discrimination. "* * * [U]nless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause." *Southern Railway Co., supra,* at 526. Consequently, appellant's assessments are constitutional.

For these reasons, I dissent.

LOCHER and J. P. CELEBREZZE, JJ., concur in the foregoing dissenting opinion.

BOARD OF TAX APPEALS
STATE OF OHIO

Boothe Financial Corporation (formerly known as Boothe Courier Corporation and Boothe Computer Corporation), *Appellant,* vs. Edgar L. Lindley, Tax Commissioner of Ohio, *Appellee.*	**CASE NOS. 77-E-32 77-E-33 (PERSONAL PROPERTY TAX) DECISION AND ORDER**

APPEARANCES:

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For the Appellee — William J. Brown
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This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein under date of October 31, 1977. These appeals are from a certificate of determination of the Tax Commissioner dated October 6, 1977, wherein said official modified personal property tax assessments for years 1970 and 1971.

The body of the certificate of determination of the Tax Commissioner reads:

"This proceeding, being the application of Boothe Computer Corporation, an inter-county corporation, San Francisco, California, for review and redetermination of the assessments on intangible property and tangible personal property located in various Ohio counties for the years 1970 and 1971, after being duly heard, came on to be considered for final determination.

"The applicant is a nonmanufacturer-lessor of computer equipment and, for the years at issue, owned a number of computers which it leased out to lessees located in various Ohio taxing districts. These computers had been manufactured by the International Business Machines Corporation (hereinafter IBM), a manufacturer-lessor of computer equipment, and carried the designation 'IBM System 360', a line of third generation equipment.

"According to a memorandum submitted by the applicant under date of February 10, 1975, '(t)he computer equipment in question was purchased by Boothe either directly from IBM, a manufacturer-lessor, or from customers of IBM, who exercised their purchase option and then in turn resold the equipment to Boothe. After acquisition, Boothe leased the computer equipment to its customers, who in most, if not all, cases had been previous IBM customers.'

"The applicant stresses that its customers have had previous business dealings with IBM in an attempt to establish that the applicant leases out IBM-manufactured computers in direct competition with IBM. Because of such competition (which, although unsubstantiated, is assumed for purposes herein), Boothe contends that it is entitled to have its computers valued on the same basis as those leased out by IBM. This contention forms the basis under which Boothe allegedly returned the subject property for the years at issue.

"The applicant alleges that IBM's cost of manufacturing computer hardware is approximately 15.2% of IBM's published selling price for a package which includes such hardware plus related software items (hereinafter referred to as IBM's package selling price). The applicant further alleges that when IBM returns computer hardware leased out to Ohio customers, IBM values such hardware based upon its manufacturing cost thereof, which approximates said 15.2% of IBM's package selling price. Based upon these unsubstantiated allegations, the applicant contends that it also is entitled to value its IBM-manufactured computer hardware leased out to Ohio customers at 15.2% of IBM's package selling price.

"When the applicant acquires IBM-manufactured computer equipment, consisting of both hardware and software items, either directly from IBM or through a previous customer of IBM as outlined above, the applicant initially carries such equipment on its books in a lump sum at its cost of acquisition. It thereupon begins to depreciate said lump sum acquisition cost on its books based upon a ten year life (10% per year), so that at any particular point in time the applicant's books reflect the depreciated or net book value of such equipment. For the years at issue, the applicant allocated 30% of its lump sum acquisition costs of IBM-manufactured computer equipment to software and reported the net book value thereof as a prepaid expense in Schedule 9 of each year's return. The applicant allocated the remaining 70% of its lump sum acquisition costs of IBM-manufactured computer equipment to hardware; however, instead of valuing such hardware based upon such allocated lump sum acquisition costs, the applicant for each year assigned a value to such hardware based upon hypothetical acquisition costs estimated at 15.2% of IBM's package selling prices, to which were applied the Department of Taxation's 15% prima facie annual true value allowance in conjunction with a true value or '302' computation. The applicant included a written claim for

deduction from book value pursuant to Section 5711.18 of the Revised Code with each year's return.

"Upon audit, an examining agent of the Department of Taxation reclassified the applicant's computer software for each year from a prepaid expense reportable in Schedule 9 to an 'other taxable intangible' reportable in Schedule 10; the examining agent accepted the applicant's basic classification of computer software as an intangible item and accepted the applicant's valuation thereof, based upon the net book value of 30% of the applicant's total lump sum acquisition costs of computer equipment. In addition, the examining agent revalued the applicant's IBM-manufactured computer hardware, which was found to have been improperly valued based upon an alleged 15.2% of IBM's package selling prices rather than upon the applicant's own acquisition costs thereof. The value computed for hardware each year by the examining agent was based upon the application of the Department of Taxation's 15% prima facie annual true value allowance in conjunction with a true value or '302' computation applied to 70% of the applicant's total lump sum acquisition costs of computer equipment (including hardware and software). In addition, the examining agent made other minor changes to the applicant's returns, which will be discussed *infra*, and caused amended preliminary assessment certificates to be issued against the applicant for each year pursuant to Section 5711.24 of the Revised Code.

"The applicant timely filed applications for review and redetermination of the assessments for each year pursuant to Section 5711.31 of the Revised Code. The applicant's primary objection to the assessments concerns the valuation of its IBM-manufactured computer hardware. As recited by the applicant in its memorandum, 'it is not Boothe's primary contention that the value assessed by the Tax Commissioner against the property exceeds the true value in money.[1]

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[1]But see *infra* at p. 4.

Boothe's primary complaint is that identical (type) property belonging to IBM is, and has been discriminatorily undervalued by the Tax Commissioner.' Citing a long line of equal protection cases by the United States and Ohio Supreme Court,[2] the applicant contends that because it has alleged that computers leased out by IBM to Ohio customers have been systematically undervalued, such allegation, if substantiated, would require the Tax Commissioner to make a like undervaluation of Boothe's IBM-manufactured computers. As the applicant's memorandum continues, '(a)dmittedly, by so doing, the Commissioner perhaps will not be taxing Boothe at "true value" as required by statute; however, he will be taxing it uniformly and equally with IBM, whose return he has chosen to accept. The Courts have spoken clearly and distinctly and have said over and over again that when the statutory requirement of true value and the constitutional requirement of equal protection (or uniformity) clash, the requirement of equal protection must prevail over true value. This is the result Boothe is seeking in this case.'

"In addition to its primary contention concerning the valuation of its computer hardware, the applicant also objects to the reclassification of its computer software as an 'other taxable intangible' pursuant to Section 5701.09 of the Revised Code. While agreeing with the examining agent that its computer software is generally classifiable as intangible property, the applicant contends that such software is specifically a prepaid expense and accordingly should be included in its computation of taxable credits pursuant to Section 5701.07 of the Revised Code, as returned. The applicant also originally raised contentions concerning the reclassification of certain computer hardware from Schedule 2 to Schedule 4; although the applicant had contended that these computers were used in

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[2]*Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Koblenz* v. *Board of Revision*, 5 Ohio St. 2d 214 (1966); and *State ex rel. Struble* v. *Davis*, 132 Ohio St. 555 (1937), among others.

manufacturing by its lessees and qualified for the 50% listing percentage of Section 5711.22, Revised Code (Schedule 2), the applicant now concedes that none of the computers leased out to Ohio customers were used in manufacturing by its lessees for the years at issue and accordingly that all computer hardware is properly subject to listing in Schedule 4 at 70% of true value pursuant to Section 5711.22 of the Revised Code.[3]

"Upon consideration of the information at hand, and under the authority of Section 5711.31, Revised Code, the Tax Commissioner finds that the applicant's contentions are not well taken. Pursuant to the Ohio Supreme Court decision in *Grabler Manufacturing Co.* v. *Kosydar*, 43 Ohio St. 2d 75 (1975), the applicant's acquisition costs of IBM-manufactured equipment, which was acquired in arms-length transactions, represented the true value of such equipment *at the time of acquisition*. Furthermore, the Tax Commissioner finds that application of the Department of Taxation's 15% prima facie annual true value allowance in conjunction with the true value of '302' computation properly reflects the annual diminution in value of such equipment from the time of acquisition. Although the applicant did not originally object to the application of said 15% prima facie rate, by letter of September 14, 1977, counsel for the applicant requested 'that Boothe be granted the same 30% annual true value allowance as granted to Firstbank' (*Firstbank Financial Corporation* v. *Lindley*, B.T.A. Case No. E-1539 (May 12, 1977)). In *Firstbank*, a 30% annual true value allowance was granted for the 1974 and subsequent tax years to reflect the true value of IBM 360 computers at issue in that case. At

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[3]The asessments for 1970 reflect the erroneous listing of Schedule 4 items at 46.2% of true value, rather than at 70% of true value as required by Section 5711.22 of the Revised Code for such year, due to a computational error by the examining agent. The examining agent, upon learning of such error, sent a revised correction sheet to the applicant reflecting the proper 70% listing percentage applicable to Schedule 4 property for such year.

issue in the instant case are tax years 1970 and 1971 and, for these years, third generation IBM System 360 computers represented a relatively new breed of equipment for which an adjustment for technical and functional obsolescence is inappropriate. Accordingly, the *Firstbank* decision has no bearing on the 1970 and 1971 tax years, and the Tax Commissioner finds that application of the 15% prima facie annual true value allowance to Boothe's acquisition costs of IBM-manufactured equipment does in fact properly reflect the true value of such equipment for the years at issue.

"The applicant's primary contention in the instant case is that equipment identical to that held by Boothe would, in the hands of IBM, be attributed a much lower value. This, according to the applicant, is because IBM's equipment would be valued at its (IBM's) cost of manufacture, which the applicant contends is only a fraction of the applicant's acquisition cost. The applicant contends that the true value of equipment which IBM holds for lease in competition with Boothe is more accurately reflected by IBM's published selling prices than by IBM's cost of manufacture, and that accordingly IBM is being assessed at less than the percentage of true value authorized by Section 5711.22 of the Revised Code. Proceeding, the applicant contends that since IBM has been underassessed through undervaluation of its equipment, Boothe is also entitled to be underassessed pursuant to the due process and equal protection provisions of both the United States and Ohio Constitutions.

"The propriety of IBM's personal property taxes, as assessed, are not relevant to the present proceedings before the Tax Commissioner. Pursuant to the provisions of Chapter 5711. of the Revised Code, the Tax Commissioner is required to assure that Boothe is properly assessed at the appropriate percentage of true value of its equipment, as required by Section 5711.22, Revised Code. Upon assuring that such statutory requirements have beeen met, the Tax Commissioner's review must, of necessity, be concluded.

Any arguments concerning constitutional considerations which override the statutory requirements by which the Tax Commissioner is governed can only be considered by a court of competent jurisdiction. Having determined that the application of the 15% prima facie annual true value allowance in conjunction with the true value or '302' computation to Boothe's own acquisition costs of computer equipment properly reflects the true value of such equipment, the Tax Commissioner must value such equipment accordingly.

"Remaining to be resolved is the applicant's contention concerning the proper classification of its computer software. As previously discussed, the applicant arbitrarily segregated 30% of its lump sum acquisition cost of both hardware and software and attributed said amount to the cost of software, reporting the net book value thereof in Schedule 9 as a prepaid expense in computing taxable credits pursuant to Section 5701.07 (A) of the Revised Code. Upon audit, the examining agent accepted the book value of 30% of Boothe's lump sum acquisition cost of both hardware and software as representative of the value of such software, but reclassified this software as a Schedule 10 other taxable intangible pursuant to Section 5701.09 of the Revised Code. The applicant objects to this reclassification and contends that its software was correctly reported as a prepaid expense. However, for the reasons set forth below, the Tax Commissioner finds that the applicant's software represents neither a prepaid expense nor an other taxable intangible, but rather constitutes tangible personal property which must be valued together with its related hardware pursuant to the true value method outlined above.

"When the applicant acquires IBM-manufactured computer hardware and software, it records the acquisition cost on its books in a lump sum as computer equipment and does not separate and depreciate the hardware and software as separate items. This procedure is in accordance with generally accepted accounting principles. However, for Ohio tax pur-

poses, the applicant seeks to arbitrarily segregate 30% of the acquisition cost of its package of hardware and software, as booked, and report such arbitrary value as intangible property. No evidence has been submitted by the applicant substantiating the 30% figure assigned by it as the cost of software, and the applicant's treatment of the entire purchase price as reflecting an indivisible mass of computer equipment on its own books suggests that no such allocation is proper. In any event, pursuant to the Board of Tax Appeals decision in *Cleveland Trust Co.* v. *Lindley,* Case No. E-2011 (August 30, 1977), even if the purchase price of IBM-manufactured computer equipment were permitted to be allocated between hardware and software, the software would still constitute tangible personal property and not intangible property as contended by the applicant.

"Accordingly, the Tax Commissioner finds that all IBM-manufactured computer equipment held by the applicant for the years at issue, including both hardware and software items, constitutes tangible personal property which is properly listed in Schedule 4 at 70% of the true value thereof pursuant to Section 5711.22 (A) of the Revised Code (132 v. S 510, effective June 9, 1968). The Tax Commissioner further finds that the true value of said equipment shall be determined by taking the applicant's acquisition costs thereof and applying thereto the Department of Taxation's 15% prima facie annual true value allowance in conjunction with the true value or '302' computation. Since both hardware and software items are to be valued and listed together consistent with the above, the Tax Commissioner finds that the assessment of a Schedule 10 other taxable intangible for each of the years at issue is erroneous and must be reversed.

"Pursuant to the provisions of Section 5711.31, Revised Code, the Tax Commissioner hereby issues this certificate of determination which is his final order with regard to the assessments here under review.

"In conformity with Sections 5711.31 and 5717.02, Revised Code, upon the expiration of thirty days from the date appearing on this certificate of determination, a copy hereof will be forwarded to the Auditor of State or proper county auditor, whichever is applicable. When required by this certificate of determination such official is hereby directed to correct his records and tax lists and duplicates in accordance herewith and a copy of such corrections will be forwarded to the applicant."

The appellant's notice of appeal in Case No. 77-E-32 reads, in pertinent part:

"3. Appellant complains of appellee's final order in this matter and contends that said final order is erroneous, unreasonable and unlawful in the following respects and for the following reasons:

"A. The true value which the Tax Commissioner has assessed against Boothe's machinery and equipment is arbitrary in that it is some six to seven times higher than identical equipment being assessed by the Tax Commissioner in the hands of IBM.

"B. The Tax Commissioner has intentionally discriminated against Boothe in that he had knowledge at the time he issued the amended preliminary assessments in issue that he had accepted the true values returned by IBM for identical property at true values approximately fifteen percent of the true value which he assessed against Boothe.

"C. The increased amended preliminary assessments made by the Tax Commissioner violate Boothe's right of equal protection under the XIV Amendment to the United States Constitution and Section 2, Article I, of the Constitution of Ohio and are contrary to Section 5, Article XII, and Section 2, Article XII of the Ohio Constitution.

"D. The Tax Commissioner has assessed the computer software owned by Boothe as tangible property rather than intangible property.

"E. The Tax Commissioner did not permit Boothe to return its computer software as an intangible on Schedule 9.

"F. In the alternative, the Tax Commissioner did not permit Boothe to return its computer software as an 'other intangible' on Schedule 10.

"G. The Tax Commissioner based his assessment upon an arbitrary rate of depreciation which is not related to actual experience and does not account for functual, technical or obsolescence, contrary to Section 5711.18 and 5711.22 of the Ohio Revised Code.

"H. The Tax Commissioner has denied Boothe its rights under the constitutional provisions set forth in paragraph C above in that this Board previously has set thirty percent as the depreciation rate for the identical type of equipment owned by other taxpayers, and the Tax Commissioner has refused to grant Boothe such a rate.

"I. The Tax Commissioner has issued his increased amended preliminary assessment based upon the ownership of the machinery and equipment at issue rather than basing his assessment upon the value of the property itself.

"WHEREFORE, Boothe respectfully prays that the Board of Tax Appeals reverse, vacate and set aside the Tax Commissioner's final order dated October 6, 1977, and grant such other relief as appellant may be entitled to receive under law. Appellant further requests that a hearing upon this appeal be granted at which appellant may present such additional evidence as it may desire and as may be requisite and proper."

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript certified by the Tax Commissioner, the stipulations, the record of the hearing, and the briefs supplied by counsel for the parties.

On July 17, 1981, the Board received stipulations duly entered into by counsel for the parties. The body of the stipulations reads:

"1. At issue in this case are Ohio personal property taxes for the return years 1970 and 1971.

"2. For the return years at issue, Boothe Computer Corporation ('Boothe') was qualified to do business in Ohio and timely filed Ohio personal property tax returns which included written claims for deduction from book value.

"3. For the return years at issue, International Business Machine Corporation ('IBM') was qualified to do business in Ohio and filed Ohio personal property tax returns.

"4. For the return years at issue, Boothe owned computer equipment which it leased to customers in Ohio; Boothe was not the manufacturer of any of the computer equipment leased by it in Ohio.

"5. For the return years at issue, IBM manufactured computer equipment which it leased to customers in Ohio.

"6. For the return years at issue, all but three installations of computer equipment on lease to and in the possession of Boothe's customers in Ohio were returned as Schedule 4 property. Boothe concedes that the three installations of computer equipment which were returned as Schedule 2 property should have been listed as Schedule 4 property, as found by the Tax Commissioner, since such installations were not used in manufacturing by Boothe's customers.

"7. For the return years at issue, the computer equipment which IBM manufactured and which was on lease to and in the possession of IBM's customers in Ohio, to the extent such equipment was not used in manufacturing by IBM's customers, was properly reportable as Schedule 4 property; equipment on lease to and in the possession of IBM's customers in Ohio,

whether or not used in manufacturing by IBM's customers, was not properly reportable by IBM as Schedule 3 manufacturing inventory.

"8. The computer equipment leased by Boothe to its customers in Ohio was manufactured by IBM. Boothe acquired most of this equipment through three-party transactions in which parties that were leasing computer equipment from IBM would exercise their purchase options, acting as agents for and tendering checks provided by Boothe. Most, if not all, of the remaining equipment leased by Boothe was purchased directly from IBM.

"9. Attached hereto and made a part hereof as Exhibit A is an unsigned copy of a signed letter from Boothe to the A. O. Smith Corporation ('A. O. Smith') authorizing A. O. Smith to act as Boothe's agent for purchasing installed computer equipment which A. O. Smith previously had been leasing from IBM.

"10. Attached hereto and made a part hereof as Exhibit B is a copy of an invoice showing the purchase by A. O. Smith, of installed computer equipment from IBM at the Tipp City facility for a purchase price of $296,075.00.

"11. Attached hereto and made a part hereof as Exhibit C is a copy of Boothe's check no. 102 issued in part for the purpose of purchasing from IBM computer equipment located at A. O. Smith's, Tipp City, Ohio, facility.

"12. After having the customer exercise its option to purchase installed computer equipment from IBM, Boothe would re-lease the same equipment back to the customer, e.g., A. O. Smith, who would retain possession of the equipment at the same location.

"13. Attached hereto and made a part hereof as Exhibit D is a copy of a lease agreement entered into between Boothe and A. O. Smith for computer equipment located at Tipp City, Ohio.

"14. Attached hereto and made a part hereof as Exhibit E, is a copy of a listing of rental rates charged

by IBM and Boothe for the computer equipment located at the A. O. Smith facility at Tipp City, Ohio, which is listed on Exhibit B.

"15. Attached hereto and made a part hereof as Exhibit F is an affidavit by Robert G. Sharpe, Senior Vice President, Treasurer and Chief Financial Officer of Boothe, attesting to the fact that the computer equipment listed on Exhibit B is representative of all the computer equipment which Boothe owned and had on lease to customers in Ohio and returned on its personal property tax returns for the return years at issue.

"16. For the return years at issue, Schedule 4 computer equipment which IBM manufactured, and which was on lease to and in the possession of IBM's customers in Ohio, would have been valued by the Department of Taxation for Ohio personal property tax purposes at a true value equal to IBM's (manufacturing) cost less a 302 allowance for depreciation.

"17. For the return years at issue, Schedule 4 computer equipment owned by Boothe which IBM had manufactured, and which was on lease to and in the possession of Boothe's customers in Ohio, was valued by the Department of Taxation for Ohio personal property tax purposes at a true value equal to Boothe's (purchase) cost less a 302 allowance for depreciation.

"18. *If IBM's (manufacturing) cost for computer equipment was different than Boothe's (purchase) cost for similar IBM manufactured equipment, two similar pieces of Schedule 4 equipment leased at the same time to the same customer would be valued by the Department of Taxation for Ohio personal property tax purposes at different true values in the hands of IBM and Boothe, such valuations being based on their respective costs. The Department was aware of this at the time Boothe was assessed for the return years at issue.*"

(Emphasis Added)

The thrust of this appeal is whether the Tax Commissioner denied the appellant equal treatment under the law

by valuing its computer equipment using purchase cost while identical equipment owned by International Business Machine, IBM, was valued at manufacturing cost. Thus, the appellant is raising a constitutional issue.

The appellant strongly urges this Board to consider this constitutional issue rather than follow the dictates of S. S. *Kresge Co. v. Bowers* (1960), 170 Ohio St. 405. The appellant argues that this Board has the requisite jurisdiction to decide this issue, since the Board only has to determine that the particular result is unconstitutional not the constitutional validity of the statute.

The Tax Commissioner, finding that the statutory requirements were met, determined that any constitutional issues can only be considered by a Court of competent jurisdiction. Thus, the Tax Commissioner contends that this Board being an administrative agency created by statute lacks jurisdiction to inquire into the constitutional application of a statute. *Steward v. Evatt* (1944), 143 Ohio St. 547.

The statute in controversy, R. C. 5711.18, governs the procedure for listing personal property used in business. R. C. 5711.18 reads in pertinent part:

> "In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; * * *"

The personal property tax returns filed by the appellant included written claims for deduction from net book value.* Upon audit, the Tax Commissioner valued the appellant's computer equipment at acquisition cost (book

*The values returned approximate IBM's manufacturing costs.

value) less a "302 computation" allowance for depreciation. On its face, this meets the dictates of R. C. 5711.18. See *Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St. 2d 75. When the values returned by IBM on identical equipment are compared with the values assessed by the Tax Commissioner, the constitutional issue of equality of treatment appears.

The appellant requests this Board to look beyond the statutory requirements to value its property. The appellant insists that its computer equipment should be valued the same as IBM's computers in order to remedy the discrimination. See *Exchange Bank of Columbus v. Hines Treas.* (1853), 3 Ohio St. 1. See also *Sioux City Bridge Co. v. Dakota County* (1923), 260 U. S. 441.

The Board finds that it does not possess the requisite jurisdiction to grant the relief requested. The Tax Commissioner applied R. C. 5711.18 properly to this appellant. A decision of this Board which would order the Tax Commissioner to assess the appellant's computer equipment at the same values returned by IBM on identical equipment would necessitate declaring the statute unconstitutional.

The Board further finds that the remaining specifications of error are unsupported by the record.

It is the order of the Board of Tax Appeals that the certificate of determination of the Tax Commissioner must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

ROBERT S. BOYD, JR.
Chairman

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